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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 65

FRANK POAFPYBITTY, CARL POAFPYBITTY, THOMPSON POAFPYBITTY, LOUISE POAFPYBITTY, and LAVERNE AITSON,
Petitioners,

VERSUS

SKELLY OIL COMPANY,
Respondent.

REPLY BRIEF OF PETITIONERS

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UTTERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. CE 5-0030

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THE OPINION AND DECISION OF THE OKLAHOMA SUPREME COURT

In *Oklahoma Tax Commission, et al.* v. *McInnis, District Judge,* 409 P.2d 355 (Dec. 22, 1965), the Oklahoma Supreme Court held as follows:

> "2. In this jurisdiction, under 12 O.S. 1961, Sec. 977, a syllabus of the Oklahoma Supreme Court should be confined to the points of law arising from the facts in the case; and the reasoning of the court and the facts as disclosed in the body of an opinion will be considered by this court in arriving at a correct interpretation of the law as announced in the syllabus."

The Syllabus of the Oklahoma Supreme Court in the decision herein, is as follows (A. 61, 62):

"Syllabus

"1. The rules and regulations made by the Secretary of the Interior, pursuant to the terms of a Departmental Oil and Gas Lease covering restricted Indian lands, have the force and effect of law, and the courts of Oklahoma take judicial notice of the same.

"2. Where the lessee of a departmental oil and gas lease covering restricted Indian lands does not violate any of the directions of the Secretary of the Interior or his subordinate officers in the operation of such lease made pursuant to the terms of the lease or the valid rules and regulations made by the Secretary of the Interior, such lessee is not liable in damages for the manner it has operated said lease in a suit by the restricted Indian lessors."

The opinion of the Oklahoma Court herein adopted by eight (8) Justices and being an integral part of the decision, states, in part, to-wit (A. 65 and 69):

"The defendant argues the case under four propositions, but we believe its first proposition is decisive in its favor, which is that under the express terms of the lease and the regulations of the Secretary of the Interior made pursuant to law and which must be read into the lease, the plaintiffs are precluded from suing or recovering in this action." (A. 65)

"* * * In paragraph 6 of the lease, it is provided 'that after the restrictions are removed the lessor shall have and be entitled to any available remedy in law or equity for breach of this contract by the lessee.' We think, under the maxim '*expressio unius est exclusio alterius*', this provision deprives the lessors of the right to prosecute a suit for breach of the lease contract until the restrictions are removed, and there is no allegation in the petition that the restrictions have been removed." (A. 69)

It can be seen that the Oklahoma Supreme Court decided this case upon the *sole ground* that by reason of the Federal restrictions involved *petitioners are deprived of the right to prosecute a suit for breach of the lease contract until the restrictions are removed.* We assert such decision is erroneous and unsound, and should be reversed.

Respondent argues improper venue herein under Oklahoma law, and asserts that the Oklahoma Supreme Court *could* have affirmed the judgment of the trial court on such ground, and asks this Court to construe Oklahoma law as to venue, and affirm the decision herein on that ground, notwithstanding the fact such decision is based entirely upon construction of Federal law. The gist of respondent's argument is the general rule that an appellate court, upon appeal from a judgment of a trial court, will generally affirm the judgment of the trial court if same is correct upon any legal basis even though the trial court actually predicated its judgment upon an erroneous or unsound basis.

We submit that is no merit to this argument herein as (1) The decision herein complained of is a state appellate court decision unequivocally based upon an erroneous and unsound construction of Federal law; (2) That construction of Oklahoma law as to venue of actions in Oklahoma State Courts is a question for decision of the Oklahoma Supreme Court alone, and petitioners have been deprived of their right to have such question determined by the Oklahoma Supreme Court herein by the decision herein which erroneously determined that petitioners are deprived of the right to bring this lawsuit anywhere in Oklahoma *by reason of Federal restrictions.* (3) The rule

advanced by respondent has no application to a decision and opinion of an appellate court of last resort.

Under Oklahoma law we contend this action is a transitory action and not a local action, and the venue is properly laid in Oklahoma County where the service agent of Skelly Oil Company resides and was served with process. *Sohio Petroleum Co.* v. *Brannon* (Okla.), 189 P.2d 193; 63 A.L.R. 2d 480 n. Oil and gas in its natural state is not susceptible of ownership in place apart from the land in which found, but is "personal property" when produced and reduced to possession. *Replogle* v. *Indian Territory Illuminating Oil Co.* (Okla.), 143 P.2d 1002. *Cf. Rich* v. *Doneghy,* 71 Okla. 204, 177 Pac. 86, 3 A.L.R. 352. Title 12 O.S.A. 131, as amended in 1957, in our opinion, would not apply to this action, and it is our further opinion the Oklahoma Supreme Court would follow the *Sohio Petroleum* case, *supra,* in determining venue, if it were not for the erroneous construction of Federal law such court made in the decision herein.

In *Perkins* v. *Benquet Consolidated Mining Company,* 342 U.S. 437, 96 L.Ed. 485, 72 S.Ct. 413, the Supreme Court of Ohio had held that the doing of business in Ohio did not make a foreign corporation subject to service of summons in an action *in personam* based upon a cause of action not arising in Ohio. This was expressed in a syllabus. An opinion was promulgated in conjunction with the syllabus, and the author of the opinion based the decision unequivocally on the ground that under the then existing decisions of the United States Supreme Court a contrary holding would violate due process. It was not there disclosed whether other members of the Ohio Court shared the view

of the author of the opinion. In *Perkins* this Court said (342 U.S. at p. 443, 96 L.Ed. at p. 491):

> "The only opinion accompanying the syllabus of the court below places the concurrence of its author unequivocally upon the ground that the Due Process Clause of the Fourteenth Amendment *prohibits* the Ohio courts from exercising jurisdiction over the respondent corporation in this proceeding. That opinion is an official part of the report of the case. The report, however, does not disclose to what extent, if any, the other members of the court may have shared the view expressed in that opinion. Accordingly, for us to allow the judgment to stand as it is would risk an affirmance of a decision which might have been decided differently if the court below had felt free, under our decisions, to do so."

The State Court decision and opinion herein presents a stronger case than *Perkins*. Herein, the syllabus, and the opinion of a majority of eight (8) justices of the court, unequivocally rests the decision in this case solely upon its construction of Federal restrictions and regulations, which petitioners, and the United States as *Amicus Curiae*, aver is an erroneous and unsound construction of Federal Indian restrictions, Federal regulations and Federal law. *Cf. State Tax Commission of Utah* v. *Van Cott*, 306 U.S. 511, 83 L.Ed. 950; *Whitney* v. *California*, 274 U.S. 357, 360-361, 71 L.Ed. at p. 1099; *Manhatten Life Ins. Co.* v. *Cohen*, 234 U.S. 123, 134, 58 L.Ed. at p. 1253.

RESPONDENT'S CLAIM OF DENIAL OF DUE PROCESS AND EQUAL PROTECTION OF THE LAW

Respondent claims that the decision of the Oklahoma Supreme Court, in this case, denying the motion of respondent Skelly Oil Company to dismiss the appeal of petitioners herein from the decision of the trial court to the Supreme Court of Oklahoma (A. 53-61, 394 P.2d 515) deprived respondent Skelly Oil Company of its rights under the Fourteenth Amendment of Due Process and equal protection of the law.

We submit that this claim of respondent is not timely made. Respondent did not object nor appeal from the order denying its motion to dismiss appeal. After the denial of its motion to dismiss, the Oklahoma Supreme Court rendered the decision herein. In respondent's brief in opposition to *certiorari* no such claim as now presented is made. We do not believe that respondents should be permitted to urge the correctness of this decision as written, and in the next breath say that the same court erroneously entertained jurisdiction in the case in which it obtained a favorable decision. *Cf. The Maria Martin* (*Martin* v. *Northern Transp. Co.*), 12 Wall. 31, 20 L.Ed. 251; *Morley Construction Co.* v. *Maryland C. Co.*, 300 U.S. 185 at p. 191, 192, 81 L.Ed. 593, at p. 598.

However, we do not believe the decision of the Oklahoma Supreme Court denying said motion to dismiss offended any rights of respondent under the Fourteenth Amendment.

We submit this Court has determined there is no merit to such an argument as is here made. In *Great Northern*

Railway Company v. *Sunburst Oil & Refining Company*, 287 U.S. 358, 77 L.Ed. 360, 53 S.Ct. 145, 85 A.L.R. 254, it was held that the highest court of a state in overruling an earlier decision may, consistently with the due process clause of the Fourteenth Amendment, make a choice for itself whether the new rule declared by it shall operate prospectively only, or apply also to past transactions, and the alternative is the same whether the subject of the new decision is common law or the construction of a statute.

In the *Great Northern* case the Montana Court overruled a previous decision (*Doney* case), but also held such ruling would apply prospectively only, and adjudicated the rights of the parties under the rule of the *Doney* case. The question there was the same as the one here raised. In *Great Northern*, it is said (287 U.S. 364, 77 L.Ed. 366, 85 A.L.R. 260):

> "* * * This is a case where a court has refused to make its ruling retroactive, and the novel stand is taken that the constitution of the United States is infringed by the refusal.
>
> "We think the Federal constitution has no voice upon the subject. A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward. It may say that decisions of its highest court, though later overruled, are law none the less for intermediate transactions. Indeed there are cases intimating, too broadly (cf. Tidal Oil Co. v. Flanagan, 263 U.S. 444, 68 L.ed. 382, 44 S.Ct. 197, supra), that it *must* give them that effect; but never has doubt been expressed that it *may* so treat them if it pleases, whenever injustice or hardship will thereby be averted. * * *"

The decision of the Oklahoma Supreme Court, in making its ruling prospectively only, followed the *Great Northern case* (A. 61).

REPLY TO RESPONDENT'S ARGUMENT SUPPORTING STATE COURT DECISION

We submit that the authorities cited by respondent pertaining to restricted Indians and restricted Indian lands are clearly distinguishable in principle. The language employed in any of the cited cases should be read in the light of the particular question before the Court for decision.

Seber v. *Spring Oil Co.* (D.C. Okla. 1940), 33 F.Supp. 805, involved the issued of whether a Departmental Oil and Gas Lease, on land of an allottee of the Five Civilized Tribes, and duly approved by the Secretary of the Interior, covered and included "casinghead gas." It was claimed that the lease itself *did not grant the lessee the right and privilege to produce "casinghead gas."* The Court held that the lease there involved, which expressly incorporated Federal regulations as a part thereof, did cover, include and grant to the lessee the right to produce "casinghead gas." When the Court so construed the lease the lawsuit was concluded, as there was no allegation, nor claim made, that the lessee had not paid royalties for "casinghead gas" produced to the Secretary of the Interior in accordance with the terms of the lease. No question was even raised therein as to the right of the Indian allottee to sue.

Town of Okemah v. *United States,* 140 F.2d 963 (10th C.A.) and *Minnesota* v. *United States,* 305 U.S. 382, 59 S.Ct. 292, 83 L.Ed. 235, are cited. These two cases we submit, are clearly distinguishable as they were both proceedings

in Eminent Domain where it was sought to condemn lands belonging to Indians, the title to which was held in trust by the United States. The effect of a judgment in those cases would have been an alienation of the lands there involved.

Hansen v. *Hoffman,* 113 F.2d 780 (10th C.A.) was a case involving the will of an Indian and we submit the question here involved was not in any way before the Court in *Hansen.*[1]

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[1] Judge Phillips, of the Court of Appeals of the Tenth Circuit, was the author of the opinions in *Town of Okemah* v. *United States, supra,* and *Hansen* v. *Hoffman, supra.* Judge Phillips also was the author of the opinion of that Court in *Choctaw and Chickasaw Nations* v. *Seitz,* 193 F.2d 456, 459, 460, where it is said:

> "/7/ Thus, it will be seen that the decisions in Heckman v. United States, supra, Lane v. Pueblo of Santa Rosa, supra, and United States v. Candelaria, supra, clearly recognized the rights of restricted Indians and Indian tribes or pueblos to maintain actions with respect to their lands, although the United States would not be bound by the judgment in such an action, to which it was not a party, brought by the restricted Indian or an Indian tribe or pueblo.
>
> "We find it difficult to believe that the Supreme Court, in recognizing the right of restricted Indians, Indian tribes and pueblos to maintain an action with respect to their lands, was dealing only with the capacity to maintain the action. Clearly, its language had reference to suits to which the United States was not a party. We cannot think the Supreme Court would have dealt so extensively with the mere capacity of the restricted Indians, the tribes, and pueblos to sue and defend in respect to their lands, if it regarded the United States as an indispensable party to the action. A holding that restricted Indians, tribes, or pueblos have capacity to prosecute or defend an action with respect to their lands would be of no avail to them, if the United States is an indispensable party to such an action, since the joinder of the United States cannot be compelled. We think the inference must be drawn that the Supreme Court recognized the right of the restricted Indian, tribe, and pueblo to maintain such an action without the presence of the United States as a party."

Butler v. *Denton*, 57 F.Supp. 656 (D.C. Okla. 1944), was a dispute between Indian heirs over funds in the custody of the Secretary of the Interior (Superintendent of Five Civilized Tribes). The United States removed the case to the Federal Court and intervened and claimed the funds should remain in custody of the Superintendent for the benefit of certain full blood Indian legatees of deceased beneficiaries of a previously approved agreement settling a previous dispute between heirs of the deceased original full blood allottee. The Court upheld the position of the Government. We say there is nothing in the *Butler* case contrary to petitioners' claims herein.

United States v. *Fitzgerald*, 201 Fed. 295 (C.A. 8, 1912), holds that the United States may sue for the wrongful taking of personal property from an Indian which personal property was held by the Indian subject to the control and management of an Indian agent, and that the admission of Indians to citizenship did not necessarily withdraw the Indian's property from the control and management of the United States or relieve the United States from its duty to protect the Indian's property from force, fraud and wrongs, against such Indian. We have continuously stated that the United States could have brought the instant case, or could have intervened herein. There is nothing in *Fitzgerald* holding contrary to our position herein.

United States v. *Hellard*, 322 U.S. 363, 88 L.Ed. 1326, involved the question of whether full blood Indians of the Five Civilized Tribes may be *divested of title to restricted land* by a sale in partition proceedings to which the United States is not a party. We submit *Hellard* turned on the fact that a partition proceeding and sale was an *alienation of*

restricted land. The effect of a partition would be the same as a condemnation proceeding. The distinction here is that there is no alienation of the rights or lands of petitioners involved in the present suit. We ask the right to obtain additional benefits, not to sell or dispose of property. And we ask that the benefits from this lawsuit be paid to the United States for the benefit of petitioners (A. 42). The United States was the petitioner in *United States* v. *Hellard, supra*, and therein it is said (322 U.S. at p. 365, 88 L.Ed. at p. 1329):

> "* * * Petitioner concedes that the United States is not a necessary party to proceedings to determine heirship under § 1 of the Act of June 14, 1918. *Since restrictions on alienation do not prevent inheritance, no governmental interest is at least directly involved in such a determination.* * * *" (Emphasis ours.)

We submit that *Hellard* gives support to our position herein. We do not believe any of the many cases cited by respondent afford any authority contrary to the position of petitioners, which position is supported by the United States as *Amicus Curiae.*

NO ADMINISTRATIVE REMEDY EXISTS AS TO THIS SUIT FOR DAMAGES

Nothing in the terms of the Departmental Oil and Gas Lease, nor Federal statutes, nor Federal regulations make provision for any administrative remedy for money damages due by the lessee (respondent) for breach of the express and implied covenants of the lease. It is correct that Federal regulations provide that under certain conditions the Secretary is empowered to *cancel* the lease. It may well

be that as a condition precedent to *cancellation* the administrative remedy therefor should be first exhausted. But here we do not seek cancellation of the lease. We ask money damages from respondent lessee and submit there is no other way for money damages for such breach to be obtained than by suit in court or voluntary payment thereof by lessee. Clearly the Federal regulations do not provide any administrative remedy therefor. The United States, who administers the property involved under Federal regulations, has stated neither the Federal regulations nor the lease terms preclude maintenance of this action by petitioners (*Amicus Curiae* Memorandum, pp. 6-7).

CONCLUSION

The decision and opinion of the Supreme Court of Oklahoma should be reversed.

Respectfully submitted,

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